

AN ANALYSIS OF THE DEATH PENALTY IS AN ANCIENT AUTHORITY

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Abstract

There is not a single nation exist in the world where the death penalty never given. The first exstablished law on death penalty is dated as far back as the 18th century B.C i.e. in the “Code of Hammarabi” of Babylon, which tabulated the death punishment for 25 different crimes. The ancient Hebrews’ Mosaic Code also identifies numerous crimes which are punishable by death like other ancient codes of law lex talionis, i.e. the “law of Retaliation”. The capital punishment was also part of different civilizations at different period of times such as Hittite Code of 14th century B.C, Draconian Code of Athens of 7th century B.C (621 B.C.E) according to which the death is the sole punishment for all type of crimes, and later the law of Athens famously sanctioned the trial and death of Socrates; and Roman law of the twelve tablets of 5th century B.C according to which publishing of insulting songs or disturbing the night time peace of urban areas and later in history the Roman law famously authorised the crucifixion of Jesus of Nazareth. Death punishment was given by various types of means such as Crucifixion, Impalement, Shooting, Hanging etc. we can see with such early practices, the death penalty was seen and embodied within the authorisation of political rulers or kings, incarnated as a legal institution and used for a wide range of misconduct prescribed by law.

Paper Identification



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INTRODUCTION :

Execution of criminals and their punishment was used since the beginning of civilizations on earth particularly in all societies. In ancient era, the social system was based on tribes and clans and not on individual basis. So, the blood feuds was a common thing in that era. The real perpetrator or the person originally responsible for the crime was not even offered for execution several times. Systems which are derived from blood feuds society may survive along side the more advanced legal authorities or be given recognition by courts such as trial by Combat. One of the more contemporary culture of the blood feuds is the duel. In the ancient eras, nations existed as republics, monarchs or tribal clans. Generally they were united by a common language, familial or religious ties. The expansion generally occurred by subjugation of neighbour monarchies or tribes. As a consequence the various classes of nobility, royalty and various classes of commoners and slavery emerged. The earlier and most famous law of death punishment is Code of Hammurabi which described the various punishments for different perpetrators or group of victims. The old testament laid down the death penalty for murder, practice of magic, blasphemy and a wide range of sex crimes although evidences of actual executions were very rare.

1.1 MIDDLE AGES

In medieval and early modern Europe, long before the development of modern prison system, the death punishment was also used as a general form of punishment for even minor offences. In early modern Europe, witchcraft panic was spread across Europe and its colonies in North America. During this period of time, there were widespread claims that witches were operating as a threat to Christianity. As a result of these claims, thousands of women were prosecuted for witchcraft which are widely known as witch trials in between 15th and 18th century. In that era as there were various religions were emerging, the prosecutions related to religious discrimination, religious violence, blasphemy etc. were on the peak.

1.2 MODERN ERA

With the emergence of modern prison system and police system in the 18th century, the justice in modern era came to be increasingly allied with the concept of natural and legal right. The modern era shows a gradual increase in permanent penal institutions and police forces. As the need of abolishment of death punishment was arisen in this era also. The first detailed analysis of death punishment to demand the abolishment of death punishment could be traced back to Cesare Beccaria's *on crime and punishment* (1764). In later period, the father of modern

utilitarianism Jeremy Bentham;, Charles Dickens and Karl marx also called for abolishment of death penalty as there was a noted rise of violant criminalty at the times and places of executions. And due to this, the executions began to being carried out inside prison walls instead of public executions which was a common practice up until this period.

20th CENTURY

The 20th century was the period of world wars and mass executions. In Nazi Germany, death punishment was given by decapitation, hanging and shooting. Also death punishment was employed as a mean of maintaining military discipline such as desertion, insubordination, disobeying orders etc. were punishable by death. In this era, death punishment was also used as a potent method of political operation. Various famous dictators such as Joseph Stalin of Soviet Union, Mao Zedong of China, Adolf Hitler of Germany etc. mass executed milions of people by several methods. And partly

Under the influence of European culture, in the latter parts of the 18th century, there was a movement started to limit the scope of death penalty. The latter part of 18th century brought a dramatic transformation of penal thought and practice that was international in scope. This dramatic change appeared with the genesis of publicly supported prisons that allowed extended detention for large number of people. Before the birth of prison system and the practical possibility of lengthy imprisonment as a alternative, the only available measure for serious crimes were degrees of deviation from an simple execution. But after the invensation of prison system, there was now an alternative produced besides capital punishment for serious offenses and instead of practices of torturous execution methods; prison system allowed a variety of conditions of confinement such as solitary confinement, hard labour, no privacy and temporary meassurs for the addressing of different kinds of misconduct. From medieval time and in early modern European countries, beyond the ancient practices of poisoning, crucifixion, death by beating, stoning etc., there was a expanded list of capital crime and the form of execution further. In the middle ages, both secular and religious authorities actively participated in executions which are intentionally designed to be brutal and full of torture, for example buring alive at a stake, boiling in oil, public dissection, castration, hanging, beheading. Such brutality was intentionally conducted at public places as a spectacle and a ritual which shows that the essential element of death penalty was not only the death of the criminal but the public killing and dying on public display for setting an example in the society.

MODES OF PUNISHMENT

Throughout the history and upto the present context of time, there were several methods or modes were used for the death punishment of an accused. The degree of punishment used to differ with the severity of the crime. The more heinous a crime is, the more possibility of a death punishment. The modes of punishment evolved with the evolution of society and the different occurrences of crimes and the several and most common methods used for **capital punishment in history** can be summarised as follows:-

BURNING:

This mode of punishment was commonly used for accusation of counterfeiters or traitors.

- In the middle ages, burning at the stake was an infamous method of execution for witches and heretics. This method was a common practice in Americans.
- Burning by molten metal was also a common method for the execution of traitors which were poured the metal on their head and for counterfeiters; it was the pouring of molten metal down their neck.
- Brazen Bull method- in this method, the accused was put inside a statue of iron bull and then cooked alive on a live fire.

EXECUTION THROUGH ANIMALS:

The common practice by execution through animals are:-

- Trampling by horses,
- Crushing by elephant.
- Tearing apart by horses which was very common in imperial China and Medieval Europe and Middle East.
- Being thrown to the lions or sharks as well as crocodiles.

POISONING:

Poisoning was a very common method of execution in higher societies in the ancient era. This method was much more seen as a reputable method of death. For example in Korea, during the Joseon Dynasty, poisoning was the most common method used for royalty and nobility. It was known as a Confucian belief that a person can kill a seonbi but may not insult him. In ancient Greece, the similar method of poisoning was used as an execution method for example the death of Socrates by drinking an infusion of hemlock.

FLAYING:

Flaying, which is also known as skinning, was a method of painful and torturously slow execution in which a person's skin was peeled from the body. In the medieval Europe, searing or

cutting of flesh was used for traitors in public executions. This method referred to as flaying a person alive.

CRUCIFIXION:

In this mode of execution, a person was roped or nailed to a wooden cross or a similar apparatus such as a tree or board and was left alone to bleed and perish.

Above mentioned modes of executions were most prominent in ancient and medieval ages but with the evolution of society comes the evolution of crime and therefore in punishment. In ancient period, the modes of punishment were more brutal and were done intentionally in public to set an example in the society. But with the birth of prison system and confinement methods, the ancient and medieval method of executions were gradually abolished. With the evolving legal system, there was a need of more humanised and **modern methods of execution** which were gone through a period of trials in time which can be summarized as follows.

SHOOTING:

Shooting is a most common method of execution worldwide as this method is used in about 70 countries, with a particular form of execution by firing squad. In this method, the convict is shot to death by one or more firearms. This form of method was used to be considered as a respectful death as it was primarily used for military executions in history. In Asian countries, India, Bahrain, China, Mangolia, Yemen etc., the shooting is a common method of execution historically as well as in present times. For example in India, this method was very common in use during the Mughal period. At present times, countries like United Arab Emirates, Yemen, Oman, North Korea, Indonesia and Bahrain are the Asian Countries which still uses the method of shooting as death penalty.

GAS INHALATION:

A gas chamber is an apparatus for killing animals or humans with gas. It consisted of a sealed chamber with no windows in which a gas or any poisonous substance were introduced. Most common poisonous agents includes carbon monoxide and hydrogen cyanide. Most notable incident in history related to gas inhalation is *holocaust* in which Nazi Germany used large scale case chambers which were specifically designed for mass killings in the Second World War. In the present time in the State of Nevada of America, the gas chamber method is used as a mode of execution since the early 1990s. Lithuania also used gas chambers in 1930s.

LETHAL INJECTION:

It is the practice of injecting one or more drugs into a person with a expressive reason of causing instant death. This method is mainly used for capital punishment but this term can also

be applied to Euthanasia and other forms of suicide in a broader sense. This method was first developed in USA but now it falls under legal means of execution in Thailand, Taiwan, The Maldives, Nigeria, China and Vietnam. This method was introduced as a more humane mode of death penalty but it was often criticised as unusual and cruel.

STONING:

In this method of death punishment, a group of persons throws stones at the convict until the convict dies from blunt injury or head trauma. This form of punishment is in practice since ancient times and used for the punishment for grave crimes. This method is condemned by human rights authorities as in their regard, it is torturous, cruel and unusual and it seriously violates the human rights. As of September 2010, stoning as a mode of punishment is included in the legal system in various countries such as Saudi Arabia, Sudan, Qatar, Yemen, Iraq, Nigeria, Mauritania, Somalia and in Brunei since 2014.

ELECTROCUTION:

In this method, the alleged criminal is strapped or tied to a specifically built wooden chair with his head, legs and hands fastened with electrodes and then the electricity will be provided to the electrodes. This method was developed in 1880s as an alternative to hanging. In present times, the use of electrocution as a punishment is replaced by method of lethal injection. Now the only places which still have this method are States of Kentucky, Florida, Tennessee, South Carolina and Alabama of USA.

HANGING:

Hanging has been a common mode of death penalty since medieval times and is the primary method of capital punishment in various countries. In this method, a person is suspended around his neck by a noose or ligature. This method is also very common in present world and notably used in Asian countries such as Japan, India, Malaysia, Pakistan, Iran and Singapore.

PUNISHMENT

This chapter contemplates to study various theories of punishment. In jurisprudence, John Austin defined in his Theory of Law that “Law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him”. He also gave the term that ‘law is the command of the sovereign’ and “sanctioning” is the essential component of law. According to him, sanctioning is the only way through which the obedience to law can be secured. Sanction can be understood as a power to inflict punishment by inflicting pain or injury upon the culprit. We also understood that the immediate result of doing a criminal act is penalty. Penalty is a socially approved method which provides that a person who had committed wrong will be

punished if found guilty. That chapter is an effort to discuss the theories of penalization and their strength and efficacy in the modern penal system. **NATURE OF PUNISHMENT:**

In criminal law, any person who has committed any crime or omitted a duty which is enjoined by law is liable to be punished. Punishment can be in any form such as confinement, pain or penalty etc.. Modern penology always involved in a continuous debate whether the conventional forms of punishment should continue or there is a need of more flexible measure to inflict the punishment. The punishment is a social reaction to crime. Any punishment is a human act and involves intentional imposition of pain on the offender. Punishments are given by the law or by the authorities on behalf of law. The primary moral obligation of the authorities on behalf of law is to reaffirm the broken law and regulation against the wrongdoer who has damaged it. The duty of the authority is now to verify the criminal act and dispense it in accordance with the law. The accused have a right to be forgiven but authorities should not condone the matter or the accused as it will be not fair on the part of the victim.

The legal system provide laws for every possible thing such as life, property, liberty etc. of one's own and other person's also and also provides the sanctioning for the breaking of these laws. The intention behind the laws and punishment is to prevent and discourage the acts from happening which are prohibited by law. So we can say that the main objective of the punishment is to prevent the crime and the criminals. Each and every criminals should be punished in accordance with his gravity of his crime. In late 18th century, the famous philosopher Immanuel Kant in his book "The Metaphysical Elements of Justice", gave an interpretation to *lex talionis*, what he termed as *jus talionis* to support death punishment. Legal punishment must only be imposed on a person only in case where he committed a crime. The proof of crime and his guilt is necessary as only then he will deserve the punishment. According to Kant, only the 'Law of Retribution' or *jus talionis* can determine upto which extent or the type of punishment should be given to the offender. For the most heinous crimes, the offender must die and according to Kant, there is no other alternative that will appease the conditions of legal justice. Neo-kantians proposed the theory that the only acceptable cause for punishing a wrongdoer with a particular punishment is that "the punishment must fit the crime". Many famous studies and books written by famous philosophers, criminologists and sociologists such as Chiricos and Waldo, Tittle and Gibbs suggested that the severity of a crime and the surety of punishment are additional factors which determines the mode of punishment.

Another aspect of the punishment is that it cannot be lenient for the criminal. The first obligation of a state authority is to separate itself from the conduct of its own members. This is

necessary to protect the character and reliability of the authority giving punishment or making laws as this will show that everyone is same in the eyes of law and no one is above the law.

All types of punishment insinuates moral accountability. The society wants the punishment to access the offender mentally and physically and to feel guilt and remorse for his criminal deed. Unless and until, the society feels satisfied or felt the objective of punishment is attained, the purpose of punishment is not fully realised.

PURPOSE OF PUNISHMENT

In ancient times, the happening of a criminal act was mainly related to the evil spirits and the main objective of punishment is to appease the gods. With the evolution of society, social revenge came into existence. The society and its people, outraged by the fact that a voluntary act of crime costs a person life, gave importance to the concept of revenge and vengeance to appease the victim's family and to set an example in the society that no criminal act will be left unpunished. This act also maintained the check and balance between the wrongdoer and injured and enraged community.

The aim and objective of the punishment is to lessen the evil acts and the maintenance of lawful community. There are several reasons that can be given for the justification or explanation for why should a person be punished. Criminal punishment existed for the sole purpose of social control. It provides a clear distinction between right and wrong. For this purpose, laws are made by legislature to give the society a clear idea of do's and don't's. The severity of crime regulates the scale for punishment as for more serious and heinous crimes, there are more severe punishments whereas in some crimes, the offender is free only with an imposition of fine. The main objective which regulate the concept of punishment is same for several cultures as well as countries. The objective of criminal justice system is:

- reduction of overall criminal acts,
- to compensate the harm or injury caused by a criminal act, or
- provides justice to the victim of an offence.

There are five recognised purposes for punishment which are as follows:

DETERRENCE-

This head involves the punishing the offender with such severe punishment that it frighten and discourage the offender as well as the general population to not to commit crimes. This type of method is called deterrence which is intended that the punishment should be of such nature that the individuals rather than experiencing the punishment would choose not to commit the criminal act. The aim of deterrence is to deter the offender as well as the society at large from

committing crimes as it aims to uproot or prevent the desire of committing an offence. There are two types of deterrence: **specific** and **general deterrence**. The specific deterrence apply to only an individual defendant as when an individual is punished by an authority, he is less likely to commit the same or another type of offence due to the fear of the similar or worse punishment. The general deterrence apply to the masses. For example when the people of society came to know about an offender's punishment, the society under the fear of punishment will be deterred to commit an offence. The more severe a punishment is given to an offender, there are lesser chances of the commission of same type of offence in the community as the knowledge of punishment instills a fear of punishment and prosecution in the mind of people. And the punishment should be of such nature that the benefits of committing a crime will be outweighed by the pain of prosecution.

REHABILITATION-

Rehabilitation is the main method used to alter the offender's mental and physical behaviour. The main aim of the punishment is to not only deter the criminal acts but to also rehabilitate the offenders so that they will not commit the crime again. Rehabilitation is the process of readjusting and reforming the ideas and philosophy of a criminal. In present times, there are several rehabilitation programs which are specifically started for the criminals and prisoners. It generally includes psychological approach as well as educational methods which also includes vocational programs, counselling and treatment centres, placement. The judicial system can combine rehabilitation with imprisonment or with probation or parole. The offenders can also receive general education or work on their skills or train to work. The main aim of rehabilitation is to deter the offender to commit the crime and to place him back into the society. **Recidivism** is a term for a person repeating the same behaviour for which they have previously prosecuted. The rehabilitation is to lower the cases of the recidivism which means lowering the cases of reoffence. Rehabilitation is a process which is highly focused in the present judicial system as it gives the offender a second chance to live an honest life.

INCAPACITATION:

Incapacitation is the method to keep the offender away from society so as to prevent the commission of the same offence again. This is the most extreme method of criminal punishment which primarily focuses on reduction of crime and physical removal of the offender from society. This is used especially to protect the people of society from those type of criminals which are seen as extremely dangerous that they need to be physically removed from the society. Because if they are physically removed from the society or their ability or capacity to commit the

same offence will be removed, then they can not commit the offence. Some examples of incapacitation are imprisonment, long term prison sentences, house arrest, chemical castration for sexual offenders or the death penalty.

RETRIBUTION:

Retribution or retributive justice prevents the future offences by removing the desire for personal revenge. Whenever a criminal violates a law, judicial system requires their suffering in return and the response to a criminal act is directly proportional to the crime. Retribution is opposite of revenge as it is not personal and only directed towards the wrongful act. Whenever a criminal is adequately punished for an offence, the society and victim achieve a certain level of satisfaction that their criminal justice system is working proficiently, which in turn improve the faith in law enforcement and judicial authorities. Retriution is also helpful in deterring the acts of civil responsibility by a citizen in which a person when observes that several offender are getting away with their crimes and no action is taken against them which signifies that there is no point in his obedience to the law and thus he understands himself to be responsible for the cleaning of society from lawlessness.

RESTORATION OR RESTITUTION:

Restoration or restitution specifically applies to minor acts of crime which includes that if there is any financial or significant harm to the victim than the offender has to also go through that pain or pay back the victim for his loss. The main objective of restitution is to get the criminal to take responsibility for his actions, to understand the extent of his deeds and to give them an option to redeem themselves. This also causes further discouragement of occurrence of crime. The restoration aims to get criminals to share the experience of the said crime and to create consensus for what the said criminal can do to repair the injury caused by the offence. This can include a payment of money given to the victim of the offender, apologies, community service. The main approach is to help the offender to avoid the future crimes.

CONCLUSION :

As of 2021, 108 countries have abolished the death penalty for all crimes and 144 countries have abolished it in law or practice⁵⁷, however the death penalty persists in many places around the globe. And while its continued existence and use has for a long time been a matter of debate in the international community, international law does not prohibit the death penalty.

In recent times there has been a notable trend amongst countries away from the death penalty, marked by a rise in countries abolishing capital punishment and a noticeable decline in the rate of execution in those countries that continue to retain it⁵⁸. A myriad of factors have contributed to this, such as the influence of a developing international climate that saw abolition as a goal for civilized countries, the development of international covenants, treaties and legal institutions embodying a commitment to abolish and never reintroduce the death penalty, a wider understanding of human rights, and the impact of abolitionist States on retentionist Countries⁵⁹.

Developments in international human rights as well as international instruments aiming at abolition are at the forefront in this global shift away from capital punishment. The UDHR came into existence at a time when the world had seen the horrors of the Second World War and the Nazi regime. The rally for protecting the basic rights intrinsic to every person was never stronger. The UN by way of conventions, treaties and other international instruments have furthered their aim of championing human rights while at the same time establishing that capital punishment cannot run parallel to human rights. And even though no international instrument by the U.N. declares that the death penalty be abolished, they were created with the eventual abolition in mind.

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